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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 587

JULIE JOHNSON,

Petitioner,

vs.

CLIFFORD E. HALPIN, Acting Director of the Department of Revenue of the State of Illinois, and IVAN A. ELLIOTT, Attorney General of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Julie Johnson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in the above entitled cause, which became final on November 17, 1952.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Supreme Court of Illinois, in a decision which became final on November 17, 1952 (R. 59.) upheld the validity of the Illinois Cigarette Use Tax Act. (R. 12.) The decision is reported in 413 Ill. 257.

There is no controversy concerning the facts. Petitioner, for herself and all other persons similarly situated, brought an action to declare the Illinois Cigarette Use Tax Act unconstitutional and to enjoin its enforcement. The Superior Court of Cook County, Illinois, entered a decree declaring the Act invalid (R. 49.) and permanently enjoined respondents from enforcing it against petitioner and all other persons similarly situated. The Supreme Court of Illinois reversed the Superior Court of Cook County, dissolved the injunction and declared said Act constitutional. (R. 59.)

Petitioner, an Illinois resident, and not engaged in the cigarette business, purchased for her own use, three cartons of cigarettes from a cigarette mail order vendor in Hammond, Indiana, by placing an order in the mail at Chicago, and prepaying the purchase price and return delivery postage. The Indiana vendor deposited the filled order in the United States mails at Hammond, Indiana, and the postman delivered the three cartons of cigarettes to petitioner at her home in Chicago. The packages contained the Federal Stamp but did not have affixed the Illinois Cigarette Tax Stamp. Petitioner in her complaint alleged the above facts constituted an interstate transaction (R. 3-4.) which was admitted by respondents' motion to dismiss the complaint.

The salient provisions of the Illinois Cigarette Use Tax Act (Ill. Rev. Statutes 1951—Chap. 120, Par. 453.31-453.67.) (R. 12.) are as follows: The Act is entitled "An Act In Relation To a Tax Upon the Privilege of Using Cigarettes in This State"; it provides for a tax on the privilege of using cigarettes in Illinois at the rate of one and one-half mills per cigarette, or three cents per package, or thirty cents per carton. Illinois users who acquire cigarettes from outside Illinois must within three days after acquiring possession, file with the Illinois Depart-

ment of Revenue a declaration of possession and pay the tax thereon; (Sec. 12(a), R. 19.) they must also obtain duplicate invoices whenever purchasing cigarettes from outside the state and file one copy with the Department of Revenue. (Sec. 16, R. 22.) Any person purchasing cigarettes from outside Illinois must keep books and records for a period of three years and authority is given to any employee of the State Department of Revenue to enter the place of business of a distributor without a search warrant and inspect the premises. (Sec. 15, R. 21-22.) The Act does not exempt interstate transactions as does the Illinois Cigarette Tax Act. (Chap. 120, Sec. 453.2, 1951, Ill. Rev. Stats.)

Petitioner in her complaint alleged the Act to be unconstitutional for the following reasons, *inter alia,* to-wit:

> "it is in violation of the Commerce Clause of the Constitution of the United States, Sec. 8, Article I, in that it attempts to impose a tax upon an interstate transaction and endeavors to collect a tax on transactions consummated beyond the boundaries of the State of Illinois. (R. 5.)
>
> "The Act deprives plaintiff of her property without due process of law, contrary to the provisions of Section 1, 14th Amendment of the Federal Constitution. (R. 5-6.)"
>
> "That the Act violates the 1st Amendment of the Constitution of the United States in placing illegal restrictions on advertisements of cigarettes. (R. 7.)"
>
> "The Act makes an arbitrary and unreasonable classification of persons and is in denial of equal protection of the Federal Constitution. (R. 5-6.)"
>
> "The Act infringes and abridges the rights, privileges and immunities of the petitioner contrary to the Federal Constitution. (R. 5.)"
>
> "The Act violates the Federal Constitution in permitting search and seizure without a search warrant."

Petitioner also charged the Act violated Sections 1 and 2 of Article IX (Revenue Article) of the Illinois Constitution in that it does not authorize the Illinois legislature to adopt a "use" tax.

The Illinois Supreme Court, in its opinion, raised the question of the validity of the Act as being contrary to the Commerce Clause of the Federal Constitution and said: (R. 59.)

> "The fundamental issues presented herein are whether the Illinois Cigarette Use Tax Act, which purports to impose a tax on the privilege of using cigarettes in this State, regardless of where such cigarettes are acquired by the user, contravenes the Commerce Clause of the Federal Constitution, or violates the provision of the Revenue Article of the Constitution of Illinois."

The Supreme Court of Illinois disposed of the repugnance of the Act to the Commerce Clause of the Federal Constitution, by declaring the Illinois Cigarette Use Tax Act to be a "use" tax and said:

> "Inasmuch as the Illinois Cigarette Use Tax is a tax on the local use of cigarettes, and in no way discriminates against purchasers, who buy their cigarettes outside the State, since they pay the same tax as purchasers from Illinois distributors, the Act in no way contravenes the commerce clause of the Federal constitution."

The Supreme Court of Illinois, in its opinion, then proceeded to dispose of the obligation that a "use" tax was not permitted by the limited Revenue Article of the Illinois Constitution and declared the Illinois Cigarette Use Tax Act to be not a "use" tax, but a "privilege" tax permitted by the Illinois Constitution, and said: (R. 69.)

> "With reference to the specific privilege tax herein—" * * *

> "It is our judgment, therefore, that the privilege of using cigarettes may properly be deemed a taxable privilege. However, as a privilege tax it must still conform to the constitutional requirement of uniformity as to the class upon which it operates."

In its determination of the tax as constituting a "privilege" tax, the Supreme Court of Illinois gave no consideration, nor did it mention the admitted interstate character of the transaction involved, but the effect of its opinion is to hold that this type of a "privilege" tax on interstate commerce, is not contrary to the Commerce clause of the Federal Constitution.

The Supreme Court of Illinois also overruled petitioner's contention that the Act violated the unreasonable search and seizure provision of the Federal Constitution in permitting a search and seizure without a search warrant and said: (R. 71.)

> "* * * it has been held that provisions requiring the keeping of records or furnishing information for tax assessing and tax collecting bodies are not within the constitutional prohibition."

JURISDICTIONAL STATEMENT.

It is contended that this Court has jurisdiction under section 1257(3), title 28, United States Code.

The State statute involved is the Illinois Cigarette "Use" Tax Act. (Chap. 120, Ill. Rev. Stats. 1951, Secs. 453-31-453.67—approved July 11, 1951.) The provisions of the Act are set forth in the transcript of record filed herein, pages 12 to 34.

The opinion of the Supreme Court of Illinois was rendered on September 17, 1952. Rehearing was denied on November 17, 1952, and thereupon the opinion became

final. The Supreme Court of Illinois is the Court of last resort in the State of Illinois.

The Supreme Court of Illinois in its opinion upheld the validity of the Illinois Cigarette Use Tax Act and overruled the Federal constitutonal objections raised by petitioner.

The complaint, as above set forth, raised the federal questions and also charged that the statute in question violated, infringed, and abridged the rights, privileges and immunities of petitioner, the briefs of petitioner raised the Federal questions, and the Supreme Court of Illinois in its opinion as above set forth stated:

> "The fundamental issues presented herein are whether the Illinois Cigarette Use Tax Act, which purports to impose a tax on the privilege of using cigarettes in this State regardless of where such cigarettes are acquired by the user, contravenes the commerce clause of the Federal Constitution * * *"

The Supreme Court of Illinois based its decision on the Federal question which was an issue before the Court.

It is respectfully submitted that this Court has jurisdiction to review this judgment.

QUESTIONS PRESENTED.

1. May the State of Illinois impose a privilege tax on cigarettes, admittedly purchased for personal consumption, in interstate commerce?

2. Does the Illinois Cigarette Use Tax Act impose an unconstitutional burden on interstate commerce?

3. Does the provision in the Illinois Cigarette Use Tax Act permitting state employees to search a premises without a search warrant violate the Fourth Amendment of the Federal Constitution?

4. Does the imposition of the tax by the Illinois Cigarette Use Tax Act violate the due process clause of the Constitution and abridge the rights, privileges, and immunities of petitioner?

5. May the tax imposed by this Illinois statute be deemed a "use" tax, which is not permitted in Illinois, in order to allegedly overcome the restriction of the Commerce Clause of the Federal Constitution, and simultaneously be construed as a "privilege" tax, in order to bring it within the limited revenue article of the Illinois Constitution?

6. Does the Illinois Cigarette Use Tax Act violate the equal protection clause of the Federal Constitution in placing the tax burden upon the consumer of cigarettes, whereas the complementary Illinois Cigarette Tax Act (tax on retail occupation of selling cigarettes) imposes the tax on the seller or distributor of cigarettes?

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Illinois, in upholding a privilege tax on cigarettes, admittedly purchased in interstate commerce, has decided a federal question of substance.

2. The decision of the Supreme Court of Illinois is in direct conflict with the opinion of this Court in *Norton* v. *Department of Revenue of Illinois,* 340 U.S., 534 and with *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 and with *McLeod* v. *Dilworth,* 322 U.S. 327 and many other decisions of this Court.

3. The Supreme Court of Illinois in its decision deemed the tax imposed by the Illinois Cigarette Use Tax Act, a "use" tax (not permitted by the Illinois Constitution) in order to attempt to overcome the objection of the Federal Commerce Clause, and in the same opinion construed

the tax as a "privilege" tax in order to come within the authority of the Illinois Constitution. Clarification of this tax by this Court with respective applicable principles of law should be made.

5. This Court has never permitted a state to tax the privilege of purchasing in interstate commerce.

6. Approximately 500,000 Illinois purchasers of cigarettes by mail from other states will be affected by the decision of this class suit.

7. Approximately thirty states in the United States have sought to effect interstate sales of cigarettes and the decision of this court will settle litigation in most of these states, as well as the rights of millions of persons who purchase, not only cigarettes, but many other articles by mail.

8. The Illinois Cigarette Use Tax Act is the first alleged "use" tax to be adopted in Illinois and its final validity or invalidity will materially affect the future policy of the legislature as well as the rights of millions of Illinois citizens.

9. This is the first time that this Court is confronted with a case involving the validity of an alleged "use" tax with a complementary "occupation" tax, as distinguished from the validity of a "use" tax in a state which has a complementary "sales" tax.

10. The Supreme Court of Illinois in its decision which approves the search of premises by employees of the Department of Revenue, without a search warrant, has overruled all its previous opinions on this fundamental constitutional right and is in conflict with many opinions of this Court.

11. Since historically this Court has acted to resolve conflicts in jurisdiction and to settle important principles of law, the writ prayed for should issue, not merely for the purpose of examining into the matters of the instant case, but for the benefit of other state courts, as well as future Illinois litigants, which may be in doubt if the opinion involved is permitted to stand, or which may be encouraged to follow Illinois in its attempt to tax and unduly burden interstate commerce.

Wherefore your petitioner prays that a writ of certiorari issue, directed to the end that this cause may be reviewed and determined by this Court; that the judgment below be reversed by this Court; and that petitioner may be granted such other and further relief as to this Court shall seem proper.

Dated this 23 day of January, 1953.

Julie Johnson, Petitioner.
By Albert J. Meserow,
Counsel for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Illinois in this cause (R. 59.) is reported in 413 Ill. 257.

JURISDICTION.

The judgment of the Supreme Court of Illinois became final on November 17, 1952, when a petition for rehearing was denied. Jurisdiction of this Court is invoked pursuant to Section 1257(3), Title 28, United States Code. The jurisdictional statement appearing in the foregoing petition is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE.

A detailed statement of the case is set forth in the foregoing petition and is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

It is submitted that the Supreme Court of Illinois erred in upholding a privilege tax on cigarettes purchased in interstate commerce.

It erred in holding a privilege tax on cigarettes purchased in interstate commerce was not repugnant to Article I, Section 8 of the Federal Constitution.

It erred in holding the provision of the Illinois Cigarette Use Tax Act authorizing Department of Revenue employees to search a premises without a search warrant, valid and not unconstitutional.

It erred in construing the tax provided in the Illinois Cigarette Use Tax Act as a "use" tax in order to allegedly overcome the Federal Commerce Clause obstacle, and in the same opinion define the tax therein provided as a "privilege" tax in order to come within the restricted revenue article of the Illinois Constitution.

It erred in not giving any consideration to the admitted interstate character of the facts, while declaring the tax provided in the Act to be a "privilege" tax.

It erred in holding that the Illinois Cigarette Use Tax Act did not violate the 14th amendment of the Federal Constitution.

ARGUMENT.

I.

The Supreme Court of Illinois Erred in Declining to Follow the Principles Established by This Court That No State Can Tax the Privilege of Engaging in Interstate Commerce.

The only possible method of sustaining the validity of the Illinois Cigarette Use Tax Act under the Illinois Constitutional limitation (Article IX) was for the Illinois Supreme Court to construe it as a privilege tax. The Court did this, in part, in order to bring the tax within the power of the Illinois legislature. In its opinion the Court said:

> "Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper * * *"
>
> "It is our judgment, therefore, that the privilege of using cigarettes may properly be deemed a taxable privilege."

The interstate character of petitioner's purchase of cigarettes by mail was uncontroverted and admitted.

The tax in question places a burden on interstate commerce in requiring the Illinois resident to obtain duplicate invoices from the out-of-state vendor. The Act attempts to place a tax on a strictly interstate transaction.

Section 12(a) of the Act (R. 19) states:

> "When cigarettes are acquired for use in the state by a person * * *"

Section 15 (R. 21) in part states:

> "Every person who purchases cigarettes for shipment into Illinois from a point outside this state shall procure invoices * * *"

There are many other provisions of this Act that both directly and indirectly burden interstate commerce.

The opinion of the Supreme Court of Illinois is directly contrary to this Court's recent opinion reversing another Illinois Supreme Court case, which sought to extend Illinois taxing power to an interstate transaction. *Norton* v. *Department of Revenue, State of Illinois,* 340 U.S. 534. This Court said:

> "The only items that are so clearly interstate in character that the State could not reasonably attribute its proceeds to the local business are orders sent (from Illinois) directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax."

The opinion of the Supreme Court of Illinois is directly in conflict with the case of *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, where this Court in considering a Massachusetts tax upon an Illinois trucking company that did an interstate business, held such a tax invalid and stated:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively interstate* in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

It is therefore respectfully urged that this Illinois privilege tax is repugnant to the Commerce Clause of the Federal Constitution.

II.

The Illinois Supreme Court Erred in Holding That the Illinois Cigarette Use Tax Act, Did Not Violate the 14th Amendment of the Federal Constitution.

The tax provided under said Act violates the equal protection clause of the 14th Amendment of the Consti-

tution. It is not uniform as to the class upon which it operates. The Act places the burden of this tax on the consumer or purchaser of cigarettes while the Illinois Cigarette Tax Act, which the Act under consideration here seeks to complement, places the burden of the tax on the vendor or seller of cigarettes. It being an Occupation Tax. *Winter* v. *Barrett*, 352 Ill. 441; *People* v. *Moysey*, 384 Ill. 283.

III.

The Supreme Court of Illinois Erred in Holding the Tax Provided in the Illinois Cigarette Use Tax Act As A "Use" Tax for One Purpose and in the Same Opinion Held It to Be A "Privilege" Tax.

The State of Illinois never adopted a "use" tax in all its history for the simple reason that its Constitution (Article IX) limits the type of taxes permitted to three classes: (1) property taxes; (2) Occupation taxes; and (3) Franchise and Privilege taxes. *Bachrach* v. *Nelson*, 349 Ill. 579.

Petitioner objected to the validity of this Act on the ground that the admitted interstate transaction could not be taxed as being repugnant to the Commerce Clause of the Federal Constitution. The Supreme Court of Illinois in its opinion disposed of this objection and said the tax was a "use" tax and therefore was not repugnant to the Commerce Clause. In doing so, it ignored the obvious limitation of the Illinois Constitution which does not permit the passage of a "use" tax.

The Illinois Court, in order to overcome this fatal objection, then sought to define the tax as a "privilege" tax permitted by the Illinois Constitution. In doing so, it ignored the interestate character of the facts involved and upheld a privilege tax on interstate commerce. This

was directly in conflict with this Court's opinion in *Spector Motor Service* v. *O'Connor,* 340 U.S. 602.

IV.

The Supreme Court of Illinois Erred in Holding That the Provision of the Act Permitting Employees of the Illinois Department of Revenue to Search a Premises Without a Warrant Did Not Violate the 4th Amendment of the Constitution.

The Act in question authorizes (R. 21-22) employees of the Department of Revenue of Illinois to search a premises, presumably to seek unstamped cigarettes, without a search warrant. Petitioner contends that this authority violated the constitutional guarantee against unreasonable search and seizure.

The opinion of the Supreme Court of Illinois has overruled a long line of Illinois cases on this point. *People* v. *Dolpe,* 371 Ill. 607; *People* v. *Grod,* 385 Ill. 584; *People* v. *Castree,* 311 Ill. 269; *People* v. *Poncher,* 358 Ill. 73.

The United States Court of Appeals for the Sixth Circuit in the case of *U. S.* v. *Costover,* 153 Fed. 2d 23 upheld defendant's right against unlawful search when defendant was suspected of carrying un-tax-paid liquor.

This Court, in *District of Columbia* v. *Little,* 339 U.S. 1, upheld the constitutional prohibition against unreasonable search and seizure when a health officer sought to enter a private home without a search warrant.

CONCLUSION.

For the foregoing reasons, it is urged that a writ of certiorari be granted.

Respectfully submitted,

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT.

ARGUMENT.

I.

The Illinois Supreme Court's holding that the tax in question is a "use tax" valid under the Constitution of Illinois is conclusive here. Once it is recognized that the tax in question is a "use tax" it must be sustained under decisions of this Court that are directly in point.

Petitioner's attack upon the validity of the tax in question is premised upon her assertion that the Constitution of Illinois does not permit "use taxes". But the Illinois Su-

preme Court held the contrary in the instant case. The Court said in its opinion in this case, *Johnson* v. *Halpin*, 413 Ill. 257, at page 262:

> "The fact that the State has never had any type of use tax or that an administrative study group may have expressed doubt as to the practicability or constitutionality of a general use tax in Illinois, as pointed out by plaintiff, does not constitute legal grounds for invalidating a statute."

The Illinois Supreme Court, having sustained the tax as valid under the Illinois Constitution, correctly perceived that it is precisely the kind of use tax that was sustained by this Court in *Nelson* v. *Sears-Roebuck & Company*, 312 U. S. 359, so far as any Federal question is concerned. In that case Iowa imposed a "use tax" upon Iowa residents with respect to property used in Iowa although imported from other states as complementing, supplementing and implementing a cognate State "sales tax".

The Illinois Supreme Court said in the opinion in the instant case (413 Ill. 257) at pages 263-4:

> "An examination of the authorities reveals, contrary to plaintiff's assertion, that the overwhelming judicial opinion among the State and Federal courts is that a tax on the use, storage or consumption of a product within the State does not impose an unconstitutional burden on interstate commerce. (129 A. L. R. 221, and cases cited.) Moreover, the Supreme Court of the United States has unequivocally determined this issue in *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359, where Sears Roebuck, as the distributor and collecting agent for the Iowa use tax, contested its validity as applied to merchandise shipped into and used in the State. The court stated: 'The validity of such a tax so far as the purchaser is concerned has been withdrawn from the arena of debate. (Citation.) * * * Use in Iowa is what is taxed regardless of the time and place of passing title, and regardless of the time the tax is required to be paid.'

"Plaintiff endeavors to distinguish this case on the ground that the Iowa constitution permits a use tax; that the *Norton* case overruled it; that the statute is not the same as that involved herein; that the uniformity issue was not raised in the *Nelson* case; and that Sears Roebuck had retail stores in Iowa, whereas plaintiff is merely an individual purchaser.

"It is patent that these distinctions are without merit. The provision of the Iowa constitution authorizing use taxes does not affect the issue of whether the tax violates the Federal commerce clause; as hereinbefore noted, the *Norton* case did not overrule the *Nelson* case, but expressly distinguished use tax cases; although the details of the Iowa statute and the Illinois Cigarette Use Tax Act may vary, in so far as the commerce clause is concerned, they both tax the local use of products shipped from outside the State; the uniformity issue, in so far as it affects interstate commerce, was involved in the *Nelson* case, and the court stated that since sales made wholly within Iowa carried the same burden as mail-order sales, there was no discrimination against interstate commerce; and finally the fact that Sears Roebuck had retail stores in Iowa affected only its liability as a tax collecting agency.

"Inasmuch as the Illinois cigarette use tax is a tax on the local use of cigarettes, and in no way discriminates against purchasers who buy their cigarettes outside the State, since they pay the same tax as purchasers from Illinois distributors, the act in no way contravenes the commerce clause of the Federal Constitution."

We adopt the above quoted language of the Supreme Court of Illinois in the instant opinion as statement of our grounds for resisting petitioner's application for *certiorari*.

II.

No question of the law of search and seizure is presented.

While the Illinois Supreme Court did observe *passim* that "provisions requiring the keeping of records or furnishing information for tax assessing and tax collecting bodies are not within the constitutional prohibition" against unreasonable searches and seizures, this was a mere *dictum*.

The Court's actual holding was embodied in its utterance at page 273 of its opinion:

> "Furthermore, since plaintiff is not a distributor and would not be affected by this provision of the Cigarette Use Tax Act, she is not entitled to raise that issue in this case. *Liberty Natl. Bank* v. *Collins*, 388 Ill 549."

Petitioner is not subjected to any of the provisions for inspection of dealers' books, and is not entitled to raise any question of the constitutionality of the inspection provisions of the instant taxing act.

Conclusion.

No substantial Federal question is presented. The writ of *certiorari* should be denied.

Respectfully submitted,

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WILLIAM C. WINES,
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Of Counsel.